No. 9210.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

THE SEA INSURANCE COMPANY, LTD., EAGLE STAR INSURANCE COMPANY, LTD., and THE TOKIO MARINE AND FIRE INSURANCE COMPANY, LIMITED,

Appellants,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Owner of Steamship "ARKANSAN," etc.,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

We submit the following reply to the assertions made in appellee's brief in answer to the contentions set forth in our opening brief herein and will group our answers under the following points outlined in our opening brief.

POINT I.

The Failure of the "Arkansan" to Maintain a Proper Lookout.

We stressed at great length in our opening brief that this collision was due to the gross failure of those on board the "Arkansan" to maintain a proper lookout, since they did not see the "Knoxville City" until 5:11 a. m., only two minutes before the actual collision, which occurred at 5:13 a. m.

The chief officer [A. p. 177], second officer [A. p. 226] and the lookout [A. p. 311] all testified that they saw the "Knoxville City" just about the time the first one-blast signal was sounded by the "Arkansan". The log of the "Arkansan" showed that this first one-blast signal was sounded at 5:11 a. m. Appellee now seeks to question the correctness of this entry of 5:11 a. m. made in its own log and asks the Court to accept in place thereof the estimate given by the captain of the "Arkansan" that this signal was sounded about 5:09½ [A. p. 497]. That this estimate of the captain was vague and uncertain is indicated by the fact that at the hearing before the Local Inspectors he testified that the signal was sounded at about 5:10 a. m. [A. p. 498]. He had no means of making a correct estimate of the time.

On the other hand, the second officer, who was the officer on watch, was stationed at the engine room telegraph giving the necessary signals to the engine room. As he did so he made entries in the bell book of the times [A. pp. 246, 247] when the various signals to the engine room were given. These times were taken from his watch or from the ship's clock and, accordingly, were

entered accurately. It will be found that one of these entries was made at 5:11½, at which time the engines of the "Arkansan" were stopped. Since the bell book also shows that the engines were reduced to slow speed at 5:07, and that the course of the ship was changed at 5:09, it is clear that the second officer was keeping a close watch of the time as he made his entries and that, therefore, his record of 5:11 as the time when the first one-blast signal was sounded by the "Arkansan" was an accurate one. As a matter of fact, when cross-examined, he would not change his record of the time any more than to say that it might have been out a *fraction of a minute* [A. p. 257]. It is true that he did not make the entries in his log book until approximately three hours after the collision [A. p. 234]. He had been required, however, by the captain to be careful in making his entries in the log and with the entries made by him in the bell book before him [A. p. 257] it is clear that he was very careful to enter the time when the one-blast signal was given with the greatest of accuracy. As the officer of the watch he was required to make the proper entries in his log and the written record made by him at that time, we respectfully submit, is entitled to far greater weight than the vague and uncertain estimate of the captain, who had no means of accurately fixing the time.

In challenging the correctness of its own entry in the log of the "Arkansan" of the time when the first one-blast signal was sounded, appellee manifested its appreciation of the importance of the time when this signal was sounded in fixing the question of liability for the collision. By seeking to fix this time as 5:09½, the time given by the captain of the "Arkansan", its effort

naturally was to show that the "Arkansan" was further from the point of collision than it actually was at 5:11 and that, accordingly, the two vessels were at a greater distance apart. At page 16 of its brief appellee has printed a sketch drawn by the captain of the "Arkansan" indicating the positions of that vessel before and at the time of the collision. Thus the letter "B" marks the alleged position of the "Arkansan" when the "Knoxville City" was first observed; the letter "C" marks her position when it is asserted that her engines were stopped, and the letter "D" marks her position at the time of the actual collision. The position of the "Knoxville City" at the time of the collision is marked with the letter "E" and the position of the anchored vessel "Dolius" is marked with the letter "A". Appellee calls attention to the fact that this sketch is entitled to great consideration, since it was made by the captain of the "Arkansan" immediately after the collision. In fact, the sketch is even drawn to scale to the extent that the representations of the outlines of the ships shown in the sketch are those of vessels approximately 450 feet in length [A. p. 459].

It is obvious, however, that the positions thus drawn cannot be correct. It will be found, for example, that the bow of the "Arkansan", as shown in the position marked "B", as the position of the "Arkansan" when the "Knoxville City" was first observed, is just 4½ ship lengths from the point at which her bow is indicated in the position "D" at the time of the collision. In other words, the "Arkansan" covered a total distance of 4½ ship lengths, or 2,025 feet, from the time the "Knoxville City" was first observed at 5:11 to the time when the collision occurred at 5:13. That is, the "Arkansan" in two minutes covered a distance of 2,025 feet, which

would make her rate of speed 1,012 feet per minute, or 10.12 knots per hour.

It is the contention of those on board the "Arkansan", however, that she was proceeding at the rate of only 3 to 4 knots per hour [A. p. 456], and the District Court accepted this estimate [Finding IX, A. pp. 103-104]. Oviously, therefore, the "Arkansan" could not possibly have been at the point marked "B" when the "Knoxville City" was first seen. If appellee insists that the position marked in the sketch with the letter "B" is correct, then the "Arkansan" stands condemned of gross fault in proceeding at such an excessive rate of speed. Appellee, therefore, must be bound by its own estimate and the finding of the Court of 3 or 4 knots per hour as the speed of the "Arkansan" for the two minutes immediately preceding the collision. If this rate of speed be accepted the "Arkansan" proceeded at the rate of 300 to 400 feet per minute. In the two minutes, therefore, elapsing between 5:11, when the "Knoxville City" was first observed, and 5:13, the time of the collision, the "Arkansan", at the most, would have proceeded not more than 800 feet, that is somewhat less than two of the ship lengths used in the sketch. The position of the "Arkansan", therefore, at 5:11, when the "Knoxville City" was first seen, should be indicated on the sketch in such a way that her bow will appear at a point two ship lengths from the position of her bow at the time of the collision. This, it will be found, is slightly ahead of the bow of the ship, as indicated at position "C".

A similar situation will be found to exist with respect to the position of the "Knoxville City" as claimed by those on board the "Arkansan". It is their testimony

that the "Knoxville City" when first seen was just abreast of the "Dolius", the position of which is marked with the letter "A" in the sketch. It will be found that with the "Knoxville City" in this position her bow would be 7 ship lengths from the position of her bow at the time of collision, as marked with the letter "E", that is, she was 3,150 feet from the place of collision when she was first sighted by those on board the "Arkansan" at 5:11. In the two minutes, therefore, elapsing from that time up to the time of the collision the "Knoxville City" must have covered this distance of 3,150 feet; that is, she covered 1,575 feet in one minute and her rate of speed must have been 15.75 knots per hour.

Manifestly, the "Knoxville City" did not proceed at any such rate of speed, nor has anyone claimed that she did. In fact, the captain of the "Arkansan" estimated the speed of the "Knoxville City" at about 8½ to 9 knots per hour [A. p. 467], and the District Court accepted this rate of speed [Finding XII, A. pp. 104, 105]. If this rate of speed, representing appellee's *own estimate* and the finding of the District Court be accepted, then the "Knoxville City" was proceeding at the rate of only 900 feet per minute. In the two minutes, therefore, preceding the collision she travelled a total distance of only 1,800 feet, or 4 ship lengths. In other words, at the time when the "Knoxville City" was first seen at 5:11 by those on board the "Arkansan" her bow was only 4 ship lengths away from the position which her bow occupied at the time of the collision. It will be seen, if this position is drawn in on the sketch, that the "Knoxville City" was well past the position of the "Dolius", as marked, when she was first seen by those on board the "Arkansan." As a matter of fact, appellee in its brief

at pages 78 and 79, concedes this to be the fact and calls attention to finding XV of the District Court to that effect. If the position of the "Knoxville City" be plotted with her speed, assumed as 9 knots per hour, as estimated by appellee, it will be found that her bow must have been some 3 ship lengths beyond the "Dolius" instead of just abreast of her when she was first observed at 5:11. Indeed it will be found on examining the sketch, incorporated in appellee's brief at page 49, that appellee has indicated with red arrows the positions at which it claims the "Knoxville City" was at the various times which it has inserted above each of these arrows. For the time 5:11 it has indicated with a red arrow the position of the "Knoxville City" at that time as somewhat more than 3 ship lengths from the "Dolius" and about 3½ ship lengths from the position of the "Arkansan" at the time of the collision. In other words, on this sketch on which appellee has drawn its own version of the position of the "Knoxville City", a sketch on which it places the greatest reliance, it has indicated as the position of the "Knoxville City" at 5:11 a point almost exactly the same as that which we have shown in our computations made above.

It will also be found that with the vessels in the positions at 5:11 at which *appellee's own estimates* of their respective speeds show they must have been, the distance between the "Arkansan" and the "Knoxville City" was somewhat over 4 ship lengths, or 1,800 feet, that is, at the time when the "Knoxville City" was first observed by those on board the "Arkansan", *the two vessels were only about 4 ship lengths apart.*

In submitting the foregoing data to the court it will be noted that again for the sake of argument only we

have accepted the place of collision as that claimed by appellee and have plotted out the position of the vessels at various times from appellee's own testimony and the findings of the District Court. For reasons set forth in the Isthmian brief, however, we contend that the collision actually occurred at the point claimed by appellants in that brief and appellee's testimony that the "Knoxville City" when first observed was abreast of the "Dolius" fully corroborates this contention but whether this court fixes the place of collision at the point claimed by appellants or at the point claimed by appellee it is obvious that the two vessels could not under either contention have been more than approximately four ship lengths apart when the "Knoxville City" was first seen by those on board the "Arkansan."

Of course, appellee calls attention to the fact that its witnesses estimated the distance separating the two vessels at this time as approximately half a mile. It is a known fact, however, that estimates of distances on the water are notoriously inaccurate and unreliable.

Georgic, 180 Fed. 863, 867.

The rates of speed at which the two vessels were proceeding forms a far more accurate and dependable measure of the distances involved (in fact, it is the method apparently employed by appellee at page 49 of its brief in plotting the position of the "Knoxville City" at various times) and will give the Court a far more accurate picture of the relative positions of these two vessels at the time when the "Knoxville City" was first observed. That distance, as we pointed out, was only 4 ship lengths.

Appellee has made no effort to explain why, on an admittedly bright, clear night, with excellent visibility, those on board the "Arkansan" failed to see the "Knoxville City" until two minutes before the collision, when the "Knoxville City" was only 4 ship lengths away. It is admitted in appellee's brief, at pages 84 and 75, that the master, second officer, helmsman and lookout of the "Arkansan" all had "a clear view ahead and all around". There were no other vessels moving near the entrance except a few fishing boats [A. p. 479], yet no one on the "Arkansan" saw the "Knoxville City" until 5:11, although she had gotten under way at 5:04 and was proceeding on what appellee contends to be a crossing course for 7 minutes until 5:11 before anyone on board the "Arkansan" saw her.

POINT II.

The Failure of the "Arkansan" to Reverse Her Engines in Time.

Appellee's only answer to the charge of fault made in appellant's opening brief that the "Arkansan" did not reverse her engines immediately instead of keeping them stopped for half a minute is that the "Arkansan" was brought into the position where she had to exercise judgment *in extremis* because of the faulty navigation of the "Knoxville City".

As we pointed out in our opening brief, the same contention was made in the case of the *Benalla,* 45 Fed. (2d) 864, and was answered by the Court in that case by holding that while the failure to take any action at all might be justified on the ground of *in extremis,* the

failure of the navigator to act properly when he did act could not be excused on such ground. In the present case, too, while there might be some excuse for the failure of the captain of the "Arkansan" to take any action at all until 5:11½, when he did act at that time, he was grossly at fault for not reversing his engines immediately instead of stopping them and keeping them stopped for a precious half minute, with collision imminent.

In any event, as we have pointed out in our opening brief, the defense that faulty judgment exercised by a navigator is *in extremis* is not available to a navigator whose own negligence has brought him into a position where his judgment has to be exercised *in extremis*. We cannot stress too strongly the fact that it was the failure of those on board the "Arkansan" to see the "Knoxville City" until 5:11 that brought her into the position where her navigator had to act hurriedly and without taking the proper time to figure out the course to be adopted. If those on board the "Arkansan" had seen the "Knoxville City" shortly after she got under way at 5:04, her navigator would have had 7 more minutes within which to deliberate carefully on the future course of action to be taken by his ship and he would not have been compelled to take a hurried and ill-considered step, such as stopping his engines, half a minute after he first saw the "Knoxville City".

POINT III.

The Fault of the "Arkansan" in Sounding a One-Blast Signal and Not Directing Her Course to Starboard.

In answering this charge of fault appellee takes the position that the "Arkansan", being the privileged vessel in what it claims to be a crossing course situation, was under the duty of holding her course and, accordingly, could not direct her course to starboard. If this Court should hold the situation to be one of crossing courses, then the "Arkansan" could not be charged with fault if she held her course, *provided she sounded no signal.* No provision is made under the International Rules for the sounding of any signal by a privileged vessel to indicate that she will hold her course. The positions of the vessels fix their duties in this regard without the necessity of sounding any signals.

When the "Arkansan" needlessly sounded a one-blast signal with the mistaken idea that this was an indication she was going to hold her course (as in the *Lisbonense,* 53 Fed. 293), she immediately notified the navigator of the "Knoxville City" that she was not going to hold her course, but that she was going to change her course to starboard. This is the meaning which the International Rules attach to such a signal under Article 28. By sounding this signal she notified the navigator on the "Knoxville City" that she was giving up her privilege and directing her course to starboard. Such was the

holding of the Court in the case of *The Housatonic,* 43 Fed. (2d) 125, and no authority has been cited by appellee in support of its contention that the privileged vessel cannot give up her privilege.

The cases of *Wilson v. Pacific Mail S. S. Co.,* 2 Fed. (2d) 255, and *Pacific Atlantic S. S. Co. v. United States,* 63 Fed. (2d) 414, are cited in appellee's brief as authority for its contention that the sounding of a one-blast signal by a privileged vessel in international waters does not charge her with liability, even if she does not change her course to starboard. An examination of these authorities, however, will show that in neither one of them did the Court make any such decision, nor, as a matter of fact, was the point even presented to the Court for decision. In each case the privileged vessel was criticised for not having taken the proper action at the time when it became obvious that the burdened vessel was not performing its duty of keeping clear.

The only cases, so far as we have been able to discover by careful examination of the authorities, in which the specific question was presented to the Court as to whether a privileged vessel was at fault for failing to direct her course to starboard after she had sounded a one-blast signal are those of *The Housatonic, supra,* and the *Lisbonense, supra.* In each of these cases the Court held that the privileged vessel was at fault on the specific ground that she had sounded a one-blast signal which, under International Rules, meant she was directing her course to starboard and had failed to do so. The collision in both cases occurred in international waters and the International Rules were held to apply.

The case of *The Delaware,* 161 U. S. 459, 16 Sup. Ct. Rep. 516, also cited by appellee as authority for the contention that the sounding of the one-blast signal is not a fault where the privileged vessel does not change her course to starboard, obviously has no application to the point under discussion. The decision of the Court shows clearly that the collision happened in *inland waters,* so that the Inland Rules applied. There is no provision in the Inland Rules similar to Article 28 of the International Rules under which a one-blast signal indicates that a vessel is directing her course to starboard. It is true, under Article 18, Rule 1, vessels meeting end on or nearly so are required to sound a signal of one blast and pass each other port to port. The sounding of such a one-blast signal, however, does not necessarily mean that the vessel shall direct its course to starboard and this need only be done where the circumstances so require. Possibly the wording of this Inland Rule may have confused appellee and thus explain the statement found at page 105 of its brief that Article 28 "is intended for vessels meeting end on". No authorities, of course, are cited for any such contention, nor do we think any can be found.

The decision in the case of the *Delaware* can have no effect on that of the *Lisbonense,* since in the former the Inland Rules were applied in connection with a collision occurring in inland waters, whereas in the latter case the International Rules were applied in connection with a collision occurring in international waters.

POINT IV.

Failure of the "Arkansan" as Privileged Vessel to Hold Her Course or Speed.

Appellee admits in its brief three distinct changes of course by the "Arkansan" before she finally straightened up on her heading between the breakwaters. Apparently it is appellee's contention that, since it maintained its course after 5:11, when the "Knoxville City" was first sighted, that this is sufficient under the Rules. The duty of a privileged vessel, however, to maintain her course and speed does not arise at the time when the burdened vessel is first observed. If such were the rule there would be no such duty at all if the privileged vessel did not see the burdened vessel at any time prior to the collision. The rule applies under its wording when there is "risk of collision". The risk of collision in the present case arose when the vessels were proceeding toward each other on courses that would cross, that is, after 5:04 a. m. when the "Knoxville City" got under way on a course which appellee contends was crossing that of the "Arkansan". *Wilders Steamship Company v. Low,* 112 Fed. 161, 166, 169. See, also, 33 U. S. C. A. 101. From that time on, therefore, the "Arkansan" was under the duty of holding her course and speed. Admittedly, however, she did not do so. Three changes of course were made.

Furthermore, the log of the "Arkansan" shows that her speed was reduced at 5:07 from half speed to slow speed. That is three minutes after these vessels were headed toward each other on crossing courses with plain

"risk of collision" if these courses were continued, the "Arkansan" reduced her speed. This was a clear violation of the requirements of the statute to hold her speed. Appellee, however, has made no effort whatever in its brief to explain why the speed of the "Arkansan" was reduced at this time. In the absence of any such explanation the "Arkansan" is charged with fault, since her statutory violation places upon her the duty of showing that the violation not only did not but could not have contributed to the collision. This has not even been attempted. In our opening brief we have pointed out, on the other hand, how the reduction in speed clearly helped bring about the collision.

POINT V.

The Case Is One of Special Circumstances.

As we pointed out in our opening brief the mere fact that the "Knoxville City" was on a temporary heading which would bring her across the course of the "Arkansan" did not mean that she was on a crossing course. Although appellee takes issue with our statement that the captain of the "Arkansan" knew the "Knoxville City" did not intend to continue on that course, and at pages 22 and 23 of its brief quotes his testimony to bear out their contention, the last question and answer of his testimony, as quoted on page 23, indicates clearly that he knew the "Knoxville City" "was proceeding toward the entrance of the harbor". A glance at the chart marked Exhibit A, attached to the Isthmian brief, will show

that the heading of 80 to 82 degrees true on which the "Knoxville City" was proceeding would, if it had been continued, have brought the "Knoxville City" into collision with the eastern breakwater. No man of nautical experience would assume that a vessel heading on such a course would continue on that course until it came into collision with the breakwater. For this reason, we contend the captain of the "Arkansan" must have known that the "Knoxville City" was heading for the entrance, as he testified in the quoted part of his testimony that he did know.

Appellee also calls attention to the fact that the "Knoxville City" might well have been heading for the anchorage ground C within the eastern breakwater. A glance at the chart again will show that, in order to reach anchorage ground C, the "Knoxville City" would have had to proceed on a course at least 40 to 45 degrees further to the northward. For these reasons it seems clear that the captain of the "Arkansan" knew the "Knoxville City" was not on any course which would cross his own, but that she was merely heading out of the harbor. Accordingly, when first seen, the "Knoxville City" was merely on a temporary heading, which she was employing to get on her regular course and her situation in this respect was the same as that of any other vessel leaving any enclosed area and maneuvering to get on her course.

In the *Poling Bros. No. 2,* 63 Fed. (2d) 357, cited in our opening brief, one tug was coming out of Erie Basin and another was attempting to enter it. Erie Basin is

an area enclosed with stone breakwaters, with an entrance between the ends of the breakwaters similar to the entrance to the harbor of Los Angeles near which this collision occurred. The Court in that case held it was one of special circumstances.

We respectfully submit that the decree of the District Court should be reversed and a recovery in full, with interest and costs, should be granted to appellants herein.

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